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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

STEPHEN M. GAGGERO, Plaintiff and Appellant, v. ANNA MARIE YURA, Defendant and Respondent.	B203780 (Los Angeles County Super. Ct. No. BC239810)

APPEAL from a judgment and postjudgment orders of the Superior Court of the County of Los Angeles, Mary Ann Murphy, Judge. Affirmed in part, and reversed in part.

Bostwick & Jassy, Gary L. Bostwick; Westlake Law Group and David Blake Chatfield for Plaintiff and Appellant.

Murphy Rosen & Meylan, David E. Rosen, Jodi M. Newberry, and Monica V. Ramallo-Young for Defendant and Respondent.

INTRODUCTION

Plaintiff and appellant Stephen Gaggero (plaintiff) brought an action against defendant and respondent Anna Yura (defendant), in her capacity as a successor trustee of a real estate trust, arising out of an agreement to purchase an ocean front residence owned by the trust. The primary issue was whether plaintiff and the predecessor trustee, Fredrick Harris (Harris), had reached an agreement to certain conditions, covenants, and restrictions (CC&R's) prior to Harris's death, such that plaintiff was entitled to specific performance of the purchase agreement. Following a bench trial, the trial court entered judgment in favor of defendant and orders granting defendant's motion for attorney fees and costs and denying, in part, plaintiff's motion to tax costs. Plaintiff appeals from the judgment and those postjudgment orders.

We hold that the asserted errors in the statement of decision are either not errors or not prejudicial; plaintiff forfeited his assertion that he is entitled to an order requiring defendant to remove the right of first refusal properties from the market and to continue to negotiate the CC&R's by failing to raise that issue in the trial court; there was substantial evidence to support the trial court's finding that plaintiff and Harris did not agree upon final CC&R's prior to Harris's death; and the covenant of good faith and fair dealing does not apply to the exercise of the sole discretion under the purchase agreement to propose CC&R's for acceptance or rejection by plaintiff. We also hold that the trial court did not abuse its discretion in granting defendant's motion for attorney fees, but erred in awarding nonstatutory costs. We therefore affirm the judgment and postjudgment order awarding attorney fees, but reverse the order awarding costs.

FACTUAL BACKGROUND

In 1998, Harris, as trustee of the Frederick Earl Harris II 1995 Trust (Harris Trust), offered to sell a beach front residence owned by the Trust located at 938 Palisades Beach Road (the 938 Property) for $1,200,000. The Harris Trust also owned two adjacent beach front residences at 940 Palisades Beach Road (the 940 Property) and 944 Palisades Beach

Road (the 944 Property). According to plaintiff, Harris "was looking for a buyer . . . for the 938 Property that shared [Harris's] goal . . . to form a community out of at least the three properties that he owned and possibly the other two to the north of [Harris's properties], which were five consecutive [homes bordered] by parking lots on either side. [¶] And within that sense of community, there would be architectural conditions to ensure that [residents'] views weren't blocked and there would be regulations to ensure the quiet enjoyment of those that lived there . . . and to ensure there was no visual blight." Harris marketed the property with a brochure that provided: "This extraordinary home is the first of three contiguous houses to be developed on the prestigious Gold Coast of Santa Monica. With view preservation as a key focus and the creation of a 'Sense of Community' where there has been none, this private Family/Entertainment home promises to be tops in Southern California Beach living."

In May 1998, plaintiff began negotiating with Harris for the purchase of the 938 Property. Among other things, Harris and plaintiff discussed Harris's view of the types of architectural CC&R's that would control the development of the three properties. They also discussed Harris's view of the regulatory CC&R's that would control the use and enjoyment of the three properties. In addition, Harris and plaintiff discussed Harris's desire to structure the transaction as an Internal Revenue Code section 1031[1] tax-deferred exchange (section 1031 exchange), which required, inter alia, that Harris have complete control over the closing date of the transaction. According to plaintiff, Harris "wanted to have complete control over what month, what day, what year that [the] property sold so that he could do what's called a direct exchange, which meant that when he closed escrow on [the] 938 [Property], within the same escrow he would buy another property. [¶] It [was] the safest way to do a [section] 1031 exchange. There [is] no deferral on [the exchange]. [¶] And that [is] what [Harris] wanted to do, with no pressure in shopping for his replacement property. He wanted to take his time and really look at the market."

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1 26 U.S.C. § 1031.

Plaintiff also informed Harris that plaintiff wanted to live in the 938 Property during the escrow period and Harris agreed that plaintiff could live there until the escrow closed.

On August 10, 1998, Stephanie Boren, plaintiff's step sister, and the Harris Trust entered into a residential purchase agreement (purchase agreement) in which the Trust agreed to sell the 938 Property to Boren or her assignee for $1,150,000.[2] Plaintiff explained that in order to structure his purchase of the 938 Property as a section 1031 exchange, he would use an accommodator, Boren, to purchase the property and "warehouse" it until he selected another one of his properties to sell in exchange for the 938 Property. Boren and the Harris Trust also entered into a right of first refusal agreement that granted Boren or her assignee rights of first refusal on the 940 and 944 Properties, as well as a license agreement that allowed plaintiff to reside at the 938 Property. Under the purchase agreement, the rights of first refusal did not become effective until the close of escrow on the 938 Property and could only be assigned once without Harris's consent. Also, the right of first refusal on the 944 Property expired on Harris's death. An escrow for the purchase of the 938 Property was opened in Boren's name with Chicago Title Company, and plaintiff deposited $50,000 in the escrow.[3]

The purchase agreement on the 938 Property was subject to the following condition precedent: "As a condition to Close of Escrow, the same CC&R's placed on this Property shall be placed on the [940 and 944] Properties. It is specifically understood that the Buyer has the right to reject the CC&R's as prepared by the Seller in Buyer's sole and absolute discretion. Seller shall have the right to record CC&R's on the Property [and] the [940 and 944] properties containing terms, conditions and provisions as Seller *may determine in his [sic] sole and absolute discretion*. It is a condition of Close of Escrow that Buyer and Seller agree to the identical terms, conditions and

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[2] Harris agreed to reduce the $1,200,000 listing price to $1,150,000 because Harris did not have to pay a real estate broker in connection with the transaction.

[3] Plaintiff testified that the $50,000 deposit was still in the escrow as of the time of trial.

provisions of the CC&R's to be recorded on this Property and on the [940 and 944] Properties. . . . If at any time either Buyer or Seller determines that he cannot agree on terms, conditions and provisions of the CC&R's, then either Buyer or Seller may cancel this Purchase Agreement and Addendum with no further obligations to each other except that Buyer shall receive back any deposit he has made . . . ."[4] (Italics added.)

The purchase agreement also gave the Harris Trust the right to control the closing date of the escrow by providing: "Escrow shall close concurrently with the acquisition of Seller's Replacement Property by Seller. Seller shall give Buyer thirty (30) days notice of when his Replace [*sic*] Property will close escrow. Buyer and Seller agree to cooperate with each other in accomplishing a tax deferred exchange for either party under Internal Revenue Code Section 1031; . . . ."

During the purchase negotiations and following the execution of the purchase agreement, Harris and plaintiff had meetings concerning the CC&R's and exchanged drafts of both the architectural CC&R's and the regulatory CC&R's. On November 8, 1998, Harris sent plaintiff a letter specifying the items that needed to be completed to close escrow. The cover letter stated that Harris enclosed a "Rough Draft of CC&R's" and the draft of those CC&R's was entitled at the top "Proposed." The draft of the regulatory CC&R's provided, inter alia, "No more than two [a]nimals are allowed to be kept on the premises and these animals shall not disturb the neighbors."

According to defendant, Harris's wife filed for divorce in February 1999. A custody dispute over Harris's daughter ensued. Harris was upset by the custody proceedings and was concerned he would lose custody of his daughter. During the fall of 1999 and the beginning of 2000, Harris informed defendant several times that he "didn't want to deal with [the purchase transaction for the 938 Property]," that "he was sick and

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[4] The purchase agreement provided for two mandatory CC&R's that required the owners to "trim their trees at least three times a year . . . to prevent blocking the view above the fence line" and to locate "the Oceanside stairwell between the second and third floors . . . within the building volume."

tired of [plaintiff]," and that "he would deal with [the transaction] when the custody case with his ex-wife was over."

In late 1999, plaintiff's estate planning attorney, Joseph Praske, "spoke with . . . Harris and requested that [Harris] send [him] what [Harris] believed remained to be done to close the escrow on the 938 Property." On October 15, 1999, Harris sent plaintiff the same letter and enclosures that Harris had sent almost a year earlier in November 1998. In or about December 1999, plaintiff forwarded to Praske the October 15 letter and enclosures from Harris. The copy of the regulatory CC&R's had been revised to provide, "No more than two domesticated pets, other than dogs and parrots and other noise producing animals are allowed."[5] When plaintiff saw the new language that appeared to exclude dogs, he asked Praske to line out the words "dogs and."

On January 6, 2000, Praske sent Harris a letter enclosing a revised version of the CC&R's. Praske informed Harris that "[w]e've complied with most of the items requested in your letter. Nevertheless, all the approvals are being transmitted to you herein." Praske then informed Harris that "we modified the proposed CC&R rules and regulations to include two dogs, provided they are not noisemaking. We modified the architectural CC&R's on page 2 of 7, 4 of [7], 6 of 7, and 7 of 7." Praske concluded the letter as follows: "If you are in agreement with our modifications and clarifications to the CC&R's, kindly make the modifications to the originals and send us a copy for final approval."

Upon receipt of Praske's January 6, 2000, letter, Harris told his architect, John Seibel, that he was "tired of working with [plaintiff] and [was] sick of [plaintiff's] yapping dogs." In early February 2000, Praske called Harris because he had not received any response from Harris to his January 6, 2000, letter. During the call, Harris told Praske he did not want dogs on the properties.

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[5] As noted, the November 1998 version of the regulatory CC&R's allowed up to two animals, presumably including dogs.

Praske followed up the telephone call with a February 11, 2000, letter which provided: "Last week, you and I discussed my letter dated January 6, 2000. We agree to abide by your requests and we'd like to arrange a meeting soon so that our architect, Michael J. Kent, with your assistance can proceed with matters requiring approval by the City of Santa Monica." The letter also advised Harris that, "[w]e still believe the zero lot line along the garages would enhance value. *We note that your position with respect to dogs is contrary to your earlier representation*. Also, we believe the modifications that we proposed to the CC&R's were consistent with surveys." (Italics added.)

According to defendant, Harris became ill in late February 2000. By early March 2000, he was experiencing severe headaches. He was hospitalized on March 21, 2000. From late February through the date of his initial hospitalization, Harris was unable to work. He did not want anyone to know he was sick because he was concerned his ex-wife would find out about his illness and use it against him in the custody dispute.

While in the hospital, Harris was diagnosed with incurable cancer. Harris was released from the hospital on April 4, 2000, but was re-hospitalized on April 17, 2000. Defendant was with Harris every day during his second hospitalization helping him put his affairs in order. During the second hospitalization, defendant spoke to Harris only once about plaintiff. Harris told defendant not to sell the 938 Property to plaintiff or any of plaintiff's friends or relatives if plaintiff would not accept the CC&R's. Harris also told defendant that he did not want any changes to the CC&R's, and he did not want any dogs on the property. Defendant took notes of that conversation. Defendant was named co-trustee of the Harris Trust on April 21, 2000.

On April 25, 2000, defendant sent a facsimile transmission to Stephen Fainsbert, the attorney for the Harris Trust. Defendant informed Fainsbert that Harris wanted the buyer of the 938 Property to accept the CC&R's and that Harris was adamant about the prohibition on dogs. She instructed Fainsbert to find out what plaintiff wanted. But, Fainsbert made no attempt to contact plaintiff at that time. Defendant did nothing to follow up on her April 25 facsimile transmission to Fainsbert.

On April 28, 2000, plaintiff sent Harris a letter requesting permission to make certain improvement to the 938 Property. In response, defendant sent Fainsbert another facsimile transmission stating, "[B]efore any such permission is given [defendant will] have to find out if [plaintiff] is accepting the CC&R's." Although Fainsbert subsequently wrote to plaintiff denying permission to make the requested improvements, he did not attempt to contact plaintiff about the CC&R's and did not respond to defendant.

On May 8, 2000, Fainsbert sent a letter to plaintiff informing him that Harris died that day, that defendant was the successor trustee, that the requested improvements would not be allowed, and that no dogs or other animals would be allowed on the property. The next day, plaintiff called Fainsbert, left a message, and spoke with him the following day. According to plaintiff, during that conversation, Fainsbert informed plaintiff that, under the right of first refusal agreement, plaintiff had the right to match any offer on the properties subject to that agreement, but that plaintiff could deduct from the purchase price the amount of the real estate commission if the Harris Trust sold the property to plaintiff. Fainsbert also told plaintiff that it would be best if plaintiff purchased all three properties from the Harris Trust.

In July 2000, plaintiff met with defendant at the 944 Property and asked her the price at which she intended to list the 940 and 944 Properties. When she asked plaintiff for his opinion of the estimated value of the two properties, however, plaintiff stated that he wanted to wait and review defendant's appraisals.

On August 15, 2000, plaintiff spoke to Fainsbert about the purchase price for the 940 and 944 Properties. They also discussed whether under the right of first refusal agreement, plaintiff could deduct from the purchase price an amount for a real estate commission. Plaintiff was concerned that the Harris Trust was not going to deduct the listing broker's commission from the purchase price of the properties under the right of first refusal agreement. Fainsbert also mentioned that they needed to work on the CC&R's.

On August 16, 2000, plaintiff had another telephone conversation with Fainsbert during which Fainsbert informed plaintiff that, because the CC&R's could affect the

purchase price of the properties, the Harris Trust reserved the right to change them. Plaintiff responded that the CC&R's had already been agreed upon and the Harris Trust had no right to change them. On August 17, 2000, plaintiff sent Fainsbert a letter enclosing the documents that plaintiff contended showed an agreement with Harris on the CC&R's. The letter explained that although the architectural CC&R's should be "cleaned up" by Siebel to reflect the handwritten changes made by plaintiff's architect, they could also be filed with the handwritten changes made by plaintiff's architect or as originally submitted to plaintiff by Harris in October 1999.

On August 30, 2000, Fainsbert sent plaintiff a letter contending that there was no agreement on the CC&R's. According to Fainsbert, the Harris Trust could not close escrow on the 938 Property with handwritten corrections to the architectural CC&R's and would only close the escrow if there was an agreement on all the CC&R's.

Thereafter, the parties exchanged correspondence, but were unable to resolve the dispute over the CC&R's. On October 23, 2000, the Harris Trust listed the 940 and 944 Properties for sale. On October 31, 2000, Fainsbert sent Boren a letter by overnight courier stating that Boren had 45 days to close escrow on the 938 Property. On November 1, 2000, Fainsbert sent plaintiff a letter advising him that Fainsbert was "sending [plaintiff] as a courtesy a copy of the CC&R's that *will be recorded*." (Italics added.) The same day plaintiff responded: "Your attempt to unilaterally modify and eliminate critical aspects of the CC&R's that have been previously agreed to between [Harris] and I [*sic*] is *unacceptable*. Your refusal to assure me in plain English rather than legal speak weather [*sic*] or not [defendant] and you intend to honor [the right of first refusal agreement] prior to the close of the 938 escrow is also unacceptable." (Italics added.) Plaintiff demanded that the properties subject to the right of first refusal not be sold unless and until the CC&R's were agreed upon and finalized.[6] On November 6, 2000, plaintiff filed this action.

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[6] As noted above, the rights of first refusal did not become effective unless and until the escrow on the 938 Property closed.

PROCEDURAL BACKGROUND

On January 22, 2001, plaintiff filed the operative first amended complaint. Plaintiff asserted three causes of action against defendant, in her capacity as the trustee of the Harris Trust: (1) specific performance; (2) declaratory relief; and (3) breach of the implied covenant of good faith and fair dealing. On the first cause of action for specific performance, plaintiff sought orders requiring defendant to (i) promptly record the CC&R's agreed to between plaintiff and Harris; (ii) promptly complete the sale of the 938 Property to plaintiff's accommodator; and (iii) honor the terms of the right of first refusal. On the second cause of action for declaratory relief, plaintiff sought declarations that (i) defendant was required promptly to record the CC&R's agreed to by plaintiff and Harris; (ii) defendant was required to close the escrow on the 938 Property promptly; and (iii) plaintiff was entitled to enforce the right of first refusal against the 940 Property. On the third cause of action for breach of the implied covenant of good faith and fair dealing, plaintiff sought damages according to proof.

Prior to trial, defendant moved for and obtained summary judgment. Plaintiff appealed and, in *Gaggero v. Yura* (2003) 108 Cal.App.4th 884, this court reversed the summary judgment on the grounds that defendant "did not meet her threshold burden on summary judgment with respect to the issue of [plaintiff's] financial ability to purchase the property, and that [plaintiff] raised triable issues of material fact concerning his intent to purchase the property and the existence of an agreement to conditions, covenants, and restrictions to be placed on the property." (*Id.* at p. 887.) The matter proceeded to a lengthy court trial. On August 8, 2007, the trial court filed its statement of decision ruling in favor of defendant on all three causes of action. The trial court found that plaintiff had "credibility issues," explaining that "[w]hile being questioned by his own attorney on direct examination, [plaintiff] gave straightforward answers. On cross-examination by opposing counsel, [p]laintiff] was combative, evasive, non-responsive, and was impeached by his deposition testimony many times. He gave answers at trial

that directly conflicted with his testimony at trial. He argued with opposing counsel and commented on his questions. At times during cross-examination, he was angry, red-faced and raised his voice at opposing counsel." The trial court also found that Praske had credibility problems, explaining that Praske "gave the appearance of one with a selective memory, was evasive on critical points, did not remember things that one would have expected him to remember, and was impeached with his deposition many times. He gave the overall impression that he was trying to help . . . [p]laintiff]." By contrast, the trial court found that defendant and Siebel were credible witnesses.

The trial court determined that plaintiff and Harris did not agree to CC&R's before Harris's death, noting that "[t]o the extent that [p]laintiff testified that he and . . . Harris agreed on the CC&R's before . . . Harris died, that testimony [was] not credible, it conflicts with letters his attorney sent and [was] not supported by the documents created at the time. The trial court further concluded that agreement on the CC&R's was also a condition precedent to the right of first refusal on the 940 and 944 Properties and that defendant did not breach the implied covenant of good faith and fair dealing.

Following the entry of judgment, the trial court granted defendant's motion for attorney fees and costs and, with the exception of striking one $23.00 cost item, denied plaintiff's motion to tax costs. Plaintiff timely appealed from the judgment and thereafter filed a separate timely appeal from the orders granting defendant's motion for attorney fees and costs and denying his motion to tax costs. This court thereafter issued a sua sponte order consolidating the two appeals for oral argument and decision.

DISCUSSION

A. Asserted Errors in Statement of Decision

Plaintiff asserts that the trial court's statement of decision "contains several erroneous statements that are brought to this Court's attention because the trial court's decision was based in some respects upon these erroneous findings." But in his ensuing

discussion of seven purported errors in the statement of decision, plaintiff fails to demonstrate how any of them prejudiced him.

Plaintiff first points to the trial court's statement that Harris owned the 938, 940, and 944 Properties and argues that, because the Harris Trust, and not Harris, held title to those properties, the trial court "did not correctly apprehend the Trust's continuous duties as an entity to negotiate in good faith and fair dealing [*sic*] *along the line of progress already achieved*, even after the death of a Trustee." But there is nothing in the statement of decision or the record that supports plaintiff's assertion. Although the statement of decision at one point mistakenly states that Harris owned the properties, it also correctly states that "Harris was the Trustee of the Frederick Earl Harris II 1995 Trust" and that "during his life, . . . Harris was the Trustee of his Trust." Based on those statements and all of the evidence in the record showing that the Harris Trust held title to the properties, it appears the trial court understood that the Harris Trust, as a separate legal entity, held title to the properties both before and after Harris's death, and, if there were an implied obligation to negotiate, it would apply to whomever was the contractual seller. Moreover, as discussed below, the covenant of good faith and fair dealing did not impose a good faith negotiation obligation on the Harris Trust's express right under the purchase agreement to propose CC&R's for approval or rejection by plaintiff. Thus, even if the trial court mistakenly believed Harris owned the properties, that error did not prejudice plaintiff because the Harris Trust was not obligated by the implied covenant to negotiate as defendant contends.

Plaintiff's second assertion of error in the statement of decision involves the trial court's description of defendant as "successor trustee." Although defendant was the co-trustee of the Harris Trust from April 21, 2000, until Harris's death on May 8, 2000, she was the successor trustee from and after that date. Therefore, even though she had fiduciary duties to the Harris Trust for a short period prior to Harris's death, the existence of those duties is irrelevant. The issue is not the extent of defendant's duties to the Harris Trust, but rather the nature and extent of her duties, as co-trustee and later successor

trustee, *to plaintiff* under the purchase agreement. Thus, plaintiff fails to demonstrate that this asserted error prejudiced him.

Plaintiff's third asserted error in the statement of decision is based on the trial court's finding that plaintiff did not want to take title in his own name. According to plaintiff, at the time the purchase agreement was signed, he intended that Boren would take title to the 938 Property in her name as a section 1031 accommodator, but that she would then transfer title to plaintiff or an entity he controlled once an exchange property had been identified. The evidence on this point is undisputed, and, although it is consistent with plaintiff's explanation of the facts, it is also consistent with the trial court's finding because plaintiff admittedly did not want to take title in his name at the time he agreed to purchase the 938 Property. Thus, the trial court's finding was not erroneous and did not prejudice plaintiff.

Plaintiff's fourth assertion is that the trial court erroneously found that both parties were represented by counsel, when in fact plaintiff was unrepresented during the negotiation of the purchase agreement and the "crafting" of the CC&R's. After making this distinction, however, plaintiff fails to state how he was prejudiced by this asserted error or to specify the aspect of the trial court's decision that was based on or affected by this purported erroneous factual finding.

Plaintiff's fifth assertion of error is based on the trial court's finding that, in Praske's January 6, 2000, letter to Harris, plaintiff "refused to agree to a prohibition on dogs." There is, however, substantial evidence to support that challenged finding. Plaintiff testified that when he saw the language prohibiting dogs, he instructed Praske to strike that language, and Praske admittedly did so. Although plaintiff testified that he rejected the language because he thought it was a mistake, the trial court concluded that plaintiff was not a credible witness, thereby supporting a finding that in the January 6, 2000, letter, plaintiff rejected the prohibition on dogs.

Plaintiff's sixth assertion of error is based on the following findings: "[T]he Trustee [defendant] had to sell [the] 940 and 944 [Properties] to pay estate taxes. Plaintiff was presented with the offer [to purchase those properties] and did not respond

with an 'unequivocal, unconditional acceptance or rejection of any proposed sale.'" According to plaintiff, the Harris Trust had sufficient funds to pay estate taxes, and there is no evidence in the record that any offer to purchase the right of first refusal properties was tendered to plaintiff and rejected by him. Even assuming plaintiff is correct on this point, he fails to demonstrate how he was prejudiced by these supposed erroneous findings.

Plaintiff's final assertion of error in the statement of decision is based on the following findings: "[Plaintiff] wanted a lower purchase price by cutting out the realtor and part of the realtor's fees. The Trustee [defendant] did not do business this way [and] declined." Contrary to plaintiff's assertion, there is substantial evidence to support this finding. Plaintiff admitted that he attempted to reduce the purchase price of the right of first refusal properties by the amount of the listing broker's commission, and defendant testified that, as the successor trustee, she did not do business that way. In any event, plaintiff fails to specify how he was prejudiced by these purportedly erroneous findings.

B. Asserted Entitlement to an Order Requiring Defendant to Continue to Negotiate

Plaintiff argues that the purchase agreement is still in effect between the parties because neither party manifested to the other an inability to agree on the CC&R's, and neither party provided notice of cancellation of the agreement based on an inability to agree. According to plaintiff, because the purchase agreement was still in effect at the time the trial court made its decision, he was entitled to an order of specific performance directing defendant to remove the 940 and 944 Properties from the market and to continue to negotiate in a good faith attempt to reach agreement on the CC&R's. As defendant correctly points out, however, plaintiff never requested those orders in the trial court and has therefore forfeited the issue on appeal.

The operative first amended complaint sought only three orders directing specific performance: (1) an order requiring defendant, on behalf of the Harris Trust, to record the CC&R's that plaintiff contends were agreed to between Harris and him; (2) an order

requiring defendant, on behalf of the Harris Trust, to complete the sale of the 938 Property to plaintiff's accommodator; and (3) an order requiring defendant, on behalf of the Harris Trust, to honor the terms of the right of first refusal agreement. The first amended complaint does not suggest or imply that plaintiff was also seeking, in the alternative to the foregoing relief, an order requiring defendant, on behalf of the Harris Trust, to remove the 940 and 944 Properties from the market and to continue negotiating the CC&R's in good faith.

Plaintiff does not contend that he expressly sought such orders from the trial court at the time of trial. And the relief sought by plaintiff in his proposed statement of decision[7] was substantially similar to the relief sought in the first amended complaint, and did not include alternative proposed relief requiring defendant to remove the 940 and 944 Properties from the market and to continue to negotiate the CC&R's in good faith.

Thus, even assuming that plaintiff is correct and the purchase agreement was still in force and effect at the time the trial court rendered its statement of decision, plaintiff forfeited the alternative relief he now seeks on appeal by failing to raise the issue in the trial court. "'It is a firmly entrenched principle of appellate practice that litigants must adhere to the theory on which a case was tried. Stated otherwise, a litigant may not change his or her position on appeal and assert a new theory. To permit this change in strategy would be unfair to the trial court and the opposing litigant. [Citations.]' (*Brown v. Boren* [(1999)] 74 Cal.App.4th [1303,] 1316.)" (*Paterson v. City of Los Angeles* (2009) 174 Cal.App.4th 1393, 1401.

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[7] In the proposed statement of decision that plaintiff filed after trial, he proposed an order requiring that he prepare CC&R's consistent with his proposed decision—which, among other things, found that agreement on the CC&R's had been reached—and that defendant be allowed to object to the proposed CC&R's, but only to the extent they did not properly reflect the findings of plaintiff's proposed decision. Plaintiff's proposed decision then provided for a mechanism by which the trial court would resolve any objections and approve the CC&R's. Upon approval, the trial court would order defendant to record the CC&R's and close escrow on the 938 Property.

C. Substantial Evidence of Parties' Failure to Agree Upon CC&R's

Plaintiff argues that, as a matter of law, this court can determine from three exhibits[8] that plaintiff and Harris agreed upon the CC&R's. According to plaintiff, those documents are unambiguous—i.e., no extrinsic evidence is necessary to construe them—and our review of this issue is therefore de novo. Defendant counters that the documents are ambiguous and that the trial court therefore properly considered disputed extrinsic evidence in concluding that no agreement had been reached. And, because disputed extrinsic evidence was necessarily considered by the trial court in resolving whether agreement had been reached, defendant argues that this issue is reviewed under the more deferential substantial evidence standard.

"In the interpretation of the contract, 'parol evidence is only admissible if the contract terms are ambiguous. [Citation.]' (*Appleton v. Waessil* (1994) 27 Cal.App.4th 551, 554 [32 Cal.Rptr.2d 676] .) 'The decision whether to admit parol evidence involves a two-step process. The first is to review the proffered material regarding the parties' intent to see if the language is "reasonably susceptible" of the interpretation urged by a party. [Citation.] If that question is decided in the affirmative, the extrinsic evidence is then admitted to aid in the second step, which involves actually interpreting the contract. [Citation.]' (*Ibid.*) [¶] In reviewing the trial court's construction of the contract, . . . several different standards of review may apply, if a party offers parol evidence to aid in interpretation. (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165-1166 [6 Cal.Rptr.2d 554].) 'On appellate review, the trial court's threshold determination of ambiguity is a question of law [citation] and is thus subject to our independent review [citation].' (*Appleton v. Waessil, supra,* 27 Cal.App.4th at pp. 554-555.) If parol evidence is admitted and is in conflict, the substantial evidence test applies. (*Id.* at p. 556.) 'However, when . . . the competent parol evidence is not conflicting, construction of the instrument is a question of law, and the appellate court will independently construe the

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[8] The exhibits upon which plaintiff relies for this argument are Exhibit 504—the October 1999 CC&R's sent to plaintiff by Harris; Exhibit 21—Praske's January 6, 2000, letter to plaintiff; and Exhibit 22—Praske's February 11, 2000, letter to Harris.

writing. [Citation.]' (*Winet v. Price, supra*, 4 Cal.App.4th at p. 1166.)" (*Roden v. Bergen Brunswig Corp*. (2003) 107 Cal.App.4th 620, 624-625.)

We deal here with whether the three exhibits upon which plaintiff relies to establish agreement upon the CC&R's. We conclude that those writings are ambiguous as to whether there was such an agreement, and therefore the trial court properly considered disputed extrinsic evidence in determining the issue. Thus, we review the trial court's determination that no agreement had been reached under a substantial evidence standard of review. Applying that standard to the evidence here, we hold that substantial evidence supports the trial court's determination that no agreement on the CC&R's had been reached prior to Harris's death.

The October 1999 CC&R's from Harris were accompanied by the same cover letter that he sent in November 1998, and that letter referred to the enclosed CC&R's as a "rough draft," not a proposed final version. And the attached regulatory CC&R's are ambiguous in at least one material respect—whether dogs were prohibited. Although the revised language from Harris on that issue suggested he was no longer willing to allow dogs on the properties, it was not clear on that point. Plaintiff admitted that to the extent the language prohibited dogs, he believed it was a mistake and he instructed Praske to line out that language. Consequently, there was substantial evidence supporting the conclusion that, as of October 1999, there was no final agreement on the CC&R's.

The January 6, 2000, letter from Praske is also ambiguous. Praske began the letter by noting that plaintiff had complied with "most of the items requested in your letter," suggesting that there were still open issues between the parties that needed to be resolved, including perhaps issues with the CC&R's. Praske's January 6 letter then stated, "Nevertheless, all the approvals are being transmitted to you herein." That sentence appears to contradict the prior one, creating an ambiguity, and, although Praske testified that the latter sentence was intended to communicate agreement on all open issues, including the CC&R's, the trial court found he was not credible and that his testimony seemed intended to benefit plaintiff. The January 6 letter went on to advise Harris that plaintiff had changed the October 1999 regulatory CC&R's to allow dogs, again raising

an ambiguity as to whether there was an agreement on the dog issue. Praske also informed Harris that plaintiff had modified the architectural CC&R's dealing with the size of the decks, raising yet another ambiguity as to whether there was an agreement on the architectural CC&R's. Praske then closed the letter with the following language: "If you are in agreement with our modifications and clarifications to the CC&R's, kindly make the modifications to the originals and send us a copy for approval." That language suggests that Praske was soliciting a final agreement from Harris, rather than confirming that one had been reached.[9] Thus, there was substantial evidence that, as of January 6, 2000, Harris and plaintiff had not reached a final agreement on the CC&R's.

The February 11, 2000, letter begins with the general statement, "We agree to abide by your requests . . . ." That language is ambiguous on its face because in context it is unclear to what "requests" it refers. The next paragraph stated, "We still believe a zero lot line along the garages would enhance value. *We note that your position with respect to dogs is contrary to your earlier representation.* Also, we believe the modifications that are proposed to the CC&R's were consistent with surveys." (Italics added.) That language contradicted the implications of the first sentence, creating further ambiguity. Both plaintiff and Praske testified that the first sentence was intended to communicate complete agreement on all open issues, including the CC&R's. The trial court considered that testimony, but rejected it on credibility grounds and also because it contradicted the subsequent language that took issue with Harris's "position with respect to dogs." In light of the trial court's finding that plaintiff's testimony about the February 11 letter was not credible, it was reasonable for the court to conclude that the language in

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[9] In deposition, Praske initially testified that he expected that if Harris agreed with the modifications to the CC&R's, Harris would modify the original and return it to plaintiff for approval, which testimony seemed to suggest that there was no agreement on the CC&R's and that there would not be unless and until Harris approved the modifications. Although Praske testified subsequently in deposition that his January 6 letter did not request that Harris approve anything, the trial court found Praske was not credible and that he had been impeached by his deposition "many times."

that letter concerning Harris's "position with respect to dogs" was an expression of disagreement on plaintiff's part as to the open issue over dogs.

Moreover, two months after the February 11, 2000, letter, defendant had a conversation with Harris during which Harris instructed defendant not to sell to plaintiff unless plaintiff accepted the October 1999 CC&R's without change, including the prohibition on dogs. That conversation suggested that Harris interpreted plaintiff's February 11 letter as a nonacceptance of Harris's position with respect to dogs. If Harris had understood Praske's February 11, 2000, letter as an unequivocal acceptance of Harris's position on dogs, there would have been no reason to instruct defendant as to Harris's position on that issue. Defendant's testimony about that conversation—which the trial court found credible—supported the other extrinsic evidence showing that, prior to Harris's death, he and plaintiff had not reached a final, unequivocal agreement on the CC&R's.

D. Application of the Covenant of Good Faith and Fair Dealing

Plaintiff contends that even if the trial court correctly concluded that there was no final agreement on the CC&R's prior to Harris's death, a final agreement was imminent and, under the implied covenant of good faith and fair dealing, defendant had an obligation to continue the negotiations from the point where the parties had last communicated, i.e., February 11, 2000. Plaintiff also argues that even if there was no final agreement on the CC&R's by February 11, defendant testified that Harris told her in April 2000 that he had decided to sell the 938 Property under the October 1999 CC&R's without any changes to them. According to plaintiff, given that undisputed evidence of Harris's intent as of April 2000, defendant was obligated under the covenant of good faith and fair dealing to comply with Harris's last expressed intent and present the October 1999 CC&R's to plaintiff for acceptance or rejection. Plaintiff argues that defendant's failure and refusal to continue to negotiate or, at a minimum, to offer the October 1999 CC&R's to plaintiff for acceptance or rejection constituted actionable breaches of the implied covenant of good faith and fair dealing.

Defendant contends, inter alia, that the implied covenant of good faith and fair dealing does not apply under these circumstances. Citing the Supreme Court's decision in *Carma Developers* (*Cal.*), *Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342 (*Carma*), defendant argues that if a contract provides a party with sole and absolute discretion, the implied covenant does not apply to an exercise of that discretion. As defendant reads it, the purchase agreement gave Harris the sole discretion to propose CC&R's for acceptance or rejection by plaintiff, and that express discretion cannot be restricted by implying a covenant of good faith and fair dealing. We agree with defendant.

In *Carma, supra,* 2 Cal.4th 342, the commercial lease between the plaintiff tenant and the defendant landlord gave the landlord the unrestricted discretion to terminate the lease in the event that the tenant notified the landlord of its intent to sublease the property. (*Id.* at pp. 351-352.) The lease also expressly permitted the landlord to pursue a new lease directly with the tenant's proposed sublessee in the event the landlord exercised its right to terminate the lease. (*Id.* at p. 352.)

During the term of the lease, the tenant notified the landlord of its intent to sublease and the landlord exercised its right to terminate the lease. (*Carma, supra,* 2 Cal.4th at p. 352.) The landlord then engaged in negotiations directly with the proposed subtenant for a new lease. The tenant sued the landlord for, inter alia, breach of the implied covenant of good faith and fair dealing. (*Ibid.*) The trial court granted summary adjudication in favor of the tenant on the cause of action for breach of the implied covenant, and the Court of Appeal affirmed. (*Id.* at p. 353.)

In reversing the Court of Appeal's decision affirming the summary adjudication order on the implied covenant cause of action, the Supreme Court in *Carma, supra,* 2 Cal.4th 342, observed: "'"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." (Rest.2d Contracts, § 205.) This duty has been recognized in the majority of American jurisdictions, the Restatement, and the Uniform Commercial Code. (Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith* (1980) 94 Harv.L.Rev. 369.)' (*Foley v. Interactive Data*

Corp. (1988) 47 Cal.3d 654, 683-684 [254 Cal.Rptr. 211, 765 P.2d 373] (hereafter *Foley*).) . . . [¶] The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith. (See, *Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 923 [216 Cal.Rptr. 345, 702 P.2d 503]; *California Lettuce Growers Assn. v. Union Sugar Co*. (1955) 45 Cal.2d 474, 484 [289 P.2d 785, 49 A.L.R.2d 496].) However, defining what is required by this covenant has not always proven an easy task." (*Carma*, *supr*a, 2 Cal.4th at pp. 371-372.)

After reviewing the scope and operation of the implied covenant in general, the court in *Carma*, *supra*, 2 Cal.4th 342, further explained that "[i]t is universally recognized the scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract. (*Foley*, *supra*, 47 Cal.3d at p. 683; *Ellis v. Chevron, U. S. A., Inc.* [(1988)] 201 Cal.App.3d [132,] 139; *Gerdlund v. Electronic Dispensers International* (1987) 190 Cal.App.3d 263, 277 [235 Cal.Rptr. 279].) As explained in *Foley*, under traditional contract principles, the implied covenant of good faith is read into contracts 'in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purpose.' (*Foley*, *supra*, 47 Cal.3d at p. 690.) (Footnote omitted.) This in fact is consistent with the general distinction between breach of the covenant of good faith as recognized in the context of a contract action and that recognized as a tort. (Footnote omitted.)" (*Carma*, *supra*, 2 Cal.4th at p. 373.)

But the court in *Carma, supra,* 2 Cal.4th 342, also recognized that the general rules regarding the covenant of good faith and fair dealing in the context of a contract action are subject to an important exception: an implied contractual term should not be read to vary express terms. "We are aware of no reported case in which a court has held the covenant of good faith may be read to prohibit a party from doing that which is expressly permitted by an agreement. On the contrary, as a general matter, implied terms should never be read to vary express terms. (*Tanner v. Title Ins. & Trust Co*. (1942) 20 Cal.2d 814, 824 [129 P.2d 383]; see, *Wal-Noon Corp. v. Hill* (1975) 45 Cal.App.3d 605,

613 [119 Cal.Rptr. 646].) 'The general rule [regarding the covenant of good faith] is plainly subject to the exception that the parties may, by express provisions of the contract, grant the right to engage in the very acts and conduct which would otherwise have been forbidden by an implied covenant of good faith and fair dealing. . . . [¶] This is in accord with the general principle that, in interpreting a contract "an implication . . . should not be made when the contrary is indicated in clear and express words." 3 Corbin, Contracts, § 564, p. 298 (1960). . . . [¶] As to acts and conduct authorized by the express provisions of the contract, no covenant of good faith and fair dealing can be implied which forbids such acts and conduct. And if defendants were given the right to do what they did by the express provisions of the contract there can be no breach.' (*VTR, Incorporated v. Goodyear Tire & Rubber Company* (S.D.N.Y. 1969) 303 F.Supp. 773, 777-778.)" (*Carma, supra,* 2 Cal.4th at p. 374.)

Applying the foregoing principles to the facts before it, the court in *Carma, supra,* 2 Cal.4th 342, held: "In this case, the Court of Appeal concluded termination of the lease solely to realize a profit was, as a matter of law, a breach of the covenant of good faith. According to the court, [the landlord's] response of outright termination to [the tenant's] request for permission was capricious and arbitrary. We cannot agree. [The landlord's] termination of the lease in order to claim for itself appreciated rental value of the premises was expressly permitted by the lease and was clearly within the parties' reasonable expectations. In our view, such conduct can never violate an implied covenant of good faith and fair dealing." (*Carma, supra*, 2 Cal.4th at p. 376.) Thus, the Supreme Court held that an implied covenant of good faith and fair dealing cannot contradict the express terms of a contract. (*Ibid.*; see *Storek & Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100 Cal.App.4th 44, 53; *Locke v. Warner Bros., Inc.* (1997) 57 Cal.App.4th 354, 365.)

In this case, the purchase agreement expressly provided that the Harris Trust, as owner of the three properties, had the sole discretion to determine the CC&R's to be recorded against those properties. "Seller [the Harris Trust] shall have the right to record CC&R's on the [938] Property . . . [and] on the [940 and 944] Properties containing

terms, conditions and provisions as Seller may determine in his [*sic*] sole and absolute discretion." On the other hand, the purchase agreement expressly gave plaintiff no control over the CC&R's to be recorded on the properties, except the power to reject the CC&R's prepared by the Harris Trust and cancel the agreement. "It is specifically understood that the Buyer [plaintiff through Boren] has the right to reject the CC&R's as prepared by the Seller in Buyer's sole and absolute discretion. . . . If at any time Buyer or Seller determines that he cannot agree on the terms, conditions and provisions of the CC&R's, then either Buyer or Seller may cancel this Purchase Agreement and Addendum with no further obligations to each other. . . ." There is nothing ambiguous about this language—the Harris Trust, through Harris, was to prepare CC&R's that Harris, in his sole and absolute discretion, determined to be appropriate, and plaintiff could either accept them or reject them and terminate the deal. It is a classic "take it or leave it" provision that is consistent with Harris's expressed desire to control the development and use of his Trust's three beach front properties.

Given the clarity of that language, it was within the reasonable expectation of the parties, including plaintiff, that Harris could insist on certain CC&R's, such as deck sizes and a prohibition on dogs, and plaintiff would be required to accept them, unless he was prepared to forego the purchase transaction. Thus, in signing a purchase agreement that included such language, plaintiff willingly bargained away any right or ability to insist on certain CC&R's or reject others, i.e., he voluntarily surrendered any contractual leverage over the formulation of the ultimate CC&R's, save and accept his right to reject the entire deal.

Contrary to plaintiff's assertion, the language in the purchase agreement concerning the development of the CC&R's does not mandate a cooperative or good faith negotiation process. In Harris's capacity as the trustee of the Harris Trust, he could have, in his sole and absolute discretion, prepared a final version of CC&R's, without any participation by plaintiff, and presented it to plaintiff on a "take it or leave it basis." Although that may not have been within plaintiff's subjective expectation, it was one of

the potential outcomes of the contract language to which he objectively agreed. (See *Stewart v. Preston Pipeline Inc*. (2005) 134 Cal.App.4th 1565, 1585-1586.)

Moreover, the language in the purchase agreement dealing with the separate license agreement does not state or imply that the parties were under a mutual and mandatory duty to negotiate CC&R's. Rather, that language refers only to the time period during which plaintiff could occupy the 938 Property under a license from the Harris Trust: "It is understood that [plaintiff] shall occupy the [938] Property after [a]cceptance of the [purchase agreement] as a [l]icensee during the period of time when Buyer and Seller attempt to negotiate terms, conditions and provisions of . . . [CC&R's] to be recorded against the [938] Property prior to [the close of escrow] . . . ." At best, that language implies that a lengthy negotiation over CC&R's *could* take place, but it does not mandate that one *must* take place. Thus, this case is not analogous to *Copeland v. Baskin Robbins U.S.A.* (2002) 96 Cal.App.4th 1251, in which the parties expressly entered into an agreement to negotiate. Here, the language of the purchase agreement limited the mandatory negotiation process to the following: a presentation by the Harris Trust of CC&R's to plaintiff, followed by either an acceptance or rejection by plaintiff. Under the express terms of the agreement, no other or further negotiation was required.

In sum, the implied covenant of good faith and fair dealing does not operate in these circumstances to modify or alter the Harris Trust's express right to control the nature and extent of the CC&R's. The Harris Trust bargained for the express and exclusive right to dictate the CC&R's, and that right cannot be diminished by implying an unexpressed duty to negotiate under the covenant of good faith and fair dealing. We therefore reject plaintiff's contentions based upon an alleged implied covenant of good faith and fair dealing.

E. Awards of Attorney Fees and Costs

1. Background

Following the entry of judgment, defendant filed a memorandum of costs seeking a total of $40,723.84 in statutory costs, including a $9,443.53 item for expert witness

fees. Defendant also filed a motion for an award of reasonable attorney fees and costs seeking $645,492.50 in attorney fees and $63,829.18 in costs.[10] Plaintiff moved to tax costs and opposed the motion for attorney fees and costs.

After hearing the oral argument, the trial court issued an order granting defendant's motion for attorney fees and costs. The trial court awarded $643,606.76 in attorney fees and $63,806.18 in both statutory and nonstatutory costs. The trial court also denied the motion to tax costs, except as to one duplicative $23.00 cost item.

2. Award of Nonstatutory Costs

Plaintiff challenges the trial court's award of nonstatutory costs as requested in the motion for attorney fees and costs, as well as the award of the $9,443.53 cost item for expert witness fees in the memorandum of costs. According to plaintiff, absent specific language in the attorney fees provision allowing the recovery of nonstatutory costs, defendant was entitled to recover only those costs allowed by statute under Code of Civil Procedure section 1033.5. We agree.

In *Carwash of America-PO v. Windswept Ventures No. I* (2002) 97 Cal.App.4th 540 (*Carwash of America*), the court addressed a similar issue, noted that there was a split in authority, and held that nonstatutory costs are not recoverable under an attorney fees provision as an expense incident to attorney fees. "'As a general rule the parties to litigation are required to finance their own participation in the litigation.' (*Ripley v. Pappadopoulos* [(1994)] 23 Cal.App.4th [1616,] 1622 (*Ripley*).) However, '[e]xcept as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.' (Code Civ. Proc., § 1032, subd. (b); further undesignated section references are to the Code of Civil Procedure.) Section 1033.5, subdivision (a), lists the items that may be recovered as costs by a prevailing party, including '[f]ees of expert witnesses ordered by the court' (§ 1033.5, subd. (a)(8)), and

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10 The request for costs included the $40,723.84 in statutory costs sought in the memorandum of costs as well as an additional amount for nonstatutory costs.

attorney fees when authorized by contract, law or statute (§ 1033.5, subd. (a)(10)(A) & (C)). Section 1033.5, subdivision (b), lists items that may not be recovered as costs unless authorized by law. Included are '[f]ees of experts not ordered by the court.' (§ 1033.5, subd. (b)(1).)" (*Carwash of America, supra*, 97 Cal.App.4th at pp. 542-543.)

"In *Bussey v. Affleck* (1990) 225 Cal.App.3d 1162 [275 Cal.Rptr. 646] (*Bussey*), the trial court refused to allow recovery of expert witness fees to a prevailing plaintiff, and the Court of Appeal reversed. The court concluded that, where a contract between the parties provides for the payment of costs and attorney fees, expenses of experts paid by counsel may be recovered as attorney fees if they represent an expense ordinarily billed to a client rather than an overhead component of the attorney's hourly rate. (*Id*. at p. 1166.) The court reasoned that such expenses are not precluded by section 1033.5, subdivision (b)(1), because they are authorized by law, namely, section 1021 and Civil Code section 1717, which permit recovery of attorney fees where authorized by contract. (*Bussey*, at p. 1167.)" (*Carwash of America, supra*, 97 Cal.App.4th at p.543.)

"In *Ripley, supra*, 23 Cal.App.4th 1616, this court disagreed with the reasoning and conclusion of *Bussey*. First, we noted that the express provisions of section 1033.5 do not allow for recovery of expert witness expenses as costs, except where the expert was ordered by the court. (*Ripley*, at p. 1624.) We further noted there are various circumstances where the Legislature has provided for the losing party to reimburse the other for expert witness fees. (*Ibid*.) We explained: 'When the numerous statutory provisions in which expert witness fees are expressly declared recoverable are considered together with the express prohibition against the inclusion of such fees in a cost award otherwise, the Legislature's intent becomes clear.' (*Id*. at p. 1625.) Regarding *Bussey*, we stated: 'In *Bussey* the court attempted to avoid the statutory prohibition against the inclusion of expert witness fees in a cost award by equating expert witness fees and other nonallowable costs of litigation with attorney fees and by concluding that such costs may be included in an award of contractual attorney fees. We cannot adhere to that approach. In the absence of some specific provision of law otherwise, attorney fees and the expenses of litigation, whether termed costs, disbursements, outlays, or something else,

are mutually exclusive . . . .' (*Id.* at pp. 1625-1626.)" (*Carwash of America, supra*, 97 Cal.App.4th at p. 543.)

"Defendants urge us to reconsider and reject the reasoning of *Ripley* and adopt the approach of *Bussey*. We decline. Every subsequent reported decision considering the issue has followed *Ripley* and rejected *Bussey*. (See *Fairchild v. Park* (2001) 90 Cal.App.4th 919, 931 [109 Cal.Rptr.2d 442]; *Steiny & Co. v. California Electric Supply Co*. (2000) 79 Cal.App.4th 285, 293-294 [93 Cal. Rptr.2d 920]; *First Nationwide Bank v. Mountain Cascade, Inc*. (2000) 77 Cal.App.4th 871, 878 [92 Cal.Rptr.2d 145]; *Robert L. Cloud & Associates, Inc. v. Mikesell* (1999) 69 Cal.App.4th 1141, 1154 [82 Cal.Rptr.2d 143]; *California Housing Finance Agency v. E.R. Fairway Associates I* (1995) 37 Cal.App.4th 1508, 1514-1515 [44 Cal.Rptr.2d 591].) We find the reasoning of *Ripley* to be sound in that it precludes an award of expert witness fees as an item of litigation costs." (*Carwash of America, supra*, 97 Cal.App.4th at p. 544.)

Notwithstanding the holdings in cases such as *Carwash of America, supra*, 97 Cal.App.4th 540, defendant urges us to follow the earlier decision in *Bussey v. Affleck, supra,* 225 Cal.App.3d 1162. We decline to do so and instead follow *Ripley v. Pappadopoulos, supra,* 23 Cal.App.4th 1616 and the other cases that have followed it. We therefore reverse the trial court's award of nonstatutory costs.

3. Award of Costs on Appeal

Plaintiff also challenges the trial court's award of nonstatutory costs to defendant that she incurred in connection with plaintiff's appeal of the summary judgment. According to plaintiff, because this court awarded him his costs on appeal as the prevailing party, defendant is not entitled to her costs incurred on appeal.

This contention appears to be directed at a portion of the *nonstatutory* costs awarded by the trial court. As discussed above, we have concluded that defendant was not entitled to the award of nonstatutory costs; therefore this separate contention is subsumed in that determination and moot.

4. Attorney Fees

a. Fees incurred on appeal

Plaintiff argues that the trial court abused its discretion when it awarded defendant attorney fees for amounts incurred in connection with his appeal of the summary judgment. According to plaintiff, because this court awarded him *costs* on appeal, defendant should not be allowed to recover her *attorney fees* incurred on appeal. We disagree.

Unlike the issue of costs on appeal, the entitlement to attorney fees on appeal was not decided in *Gaggero v. Yura, supra*, 108 Cal.App.4th 884. Therefore, determination of that issue was within the sound discretion of the trial court. (See *Akins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4th 1127, 1133 ["the amount of an attorney fee to be awarded is a matter within the sound discretion of the trial court"].)

Contrary to plaintiff's assertion, a prevailing party is entitled to all of its reasonable attorney fees, including fees incurred making unsuccessful motions. (*Akins v. Enterprise Rent-A-Car Co., supra,* 29 Cal.App.4th at p. 1134; *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1303.) As the court observed in *City of Sacramento,* "'Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.' (*Hensley* v. *Eckerhart* (1983) 461 U.S. 424, 435 [76 L.Ed.2d 40, 52, 103 S.Ct. 1933], fn. omitted.) The process of litigation is often more a matter of flail than flair; if the criteria of [Code of Civil Procedure] section 1021.5 are met the prevailing flailer is entitled to an award of attorney fees. [¶] . . . Litigation often involves a succession of attacks upon an opponent's case; indeed, the final ground of resolution may only become clear after a series of unsuccessful attacks. Compensation is ordinarily warranted even for unsuccessful forays. (See *Folsom* v. *Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 685-686 [186 Cal.Rptr. 589, 652 P.2d 437]; *Sundance* v. *Municipal Court* (1987) 192 Cal.App.3d 268, 273-274 [237 Cal.Rptr. 269].) [¶] A litigant should not be penalized for failure to find the winning line at the outset, unless the unsuccessful forays address discrete unrelated claims, are pursued in bad faith,

or are pursued incompetently, i.e, are such that a reasonably competent lawyer would not have pursued them. Time not reasonably spent by counsel for the prevailing party need not be compensated and bad faith can constitute a basis for a total disentitlement. (See *Serrano* v. *Unruh, supra*, 32 Cal.3d at p. 635.)" (*City of Sacramento v. Drew, supra,* 207 Cal.App.3d at p. 1303.)

Here, the trial court awarded defendant attorney fees for time expended on plaintiff's appeal of the summary judgment. Although defendant was not successful in her effort to uphold the summary judgment, she should not be penalized for her efforts in that regard. Having obtained a summary judgment, it was reasonable for the trial court to conclude that defendant was justified in attempting to uphold that judgment on appeal. Indeed, any reasonable party in defendant's position would have likely expended the resources necessary to contest an appeal of a judgment in that party's favor. That she was unsuccessful in that endeavor does not change the ultimate result in her favor. Accordingly, because the trial court did not abuse its discretion, we affirm the award of attorney fees to defendant for fees incurred in contesting the appeal.

b. Fees incurred on summary judgment motion

In a related argument, plaintiff argues that the trial court abused its discretion in awarding defendant attorney fees for time expended in making her motion for summary judgment. According to plaintiff, because the summary judgment was overturned by the Court of Appeal, it was not reasonable for the trial court to award defendant fees for making what was ultimately determined to be an unsuccessful motion.

For reasons similar to those discussed above in connection with the trial court's award of attorneys fees for the appeal, we disagree with plaintiff on this point. That the trial court granted defendant's summary judgment motion strongly suggests that any reasonable attorney in her trial counsel's position would have made a similar motion. Although we reversed the summary judgment, we did not hold that the underlying motion was frivolous or otherwise unreasonably made. The trial court therefore acted within its discretion in awarding defendant attorney fees for the time expended making that motion.

c. Reasonableness of fee award

Plaintiff contends that the trial court abused its discretion in awarding defendant the total amount of fees she requested. According to plaintiff, the trial court failed to exercise discretion in assessing the reasonableness of defendant's fee request and instead awarded defendant the full amount of her request because the litigation had been a hard fought, "gloves off" process.

As noted above, the determination of the reasonableness of the amount of an attorney fees award is a matter within the sound discretion of the trial court. (*Akins v. Enterprise Rent-A-Car, Inc., supra,* 79 Cal.App.4th at p. 1134.) """The 'experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong."' [Citation.]" (*Montgomery v. Bio Med Specialties, Inc.* (1986) 183 Cal.App.3d 1292, 1298 [228 Cal.Rptr. 709].)" (*Reveles v. Toyota By the Bay* (1997) 57 Cal.App.4th 1139, 1153.)

The record reflects that the trial court was familiar with the issues and the parties. And, although the trial court emphasized that the litigation had been hard fought by both sides, that was not the sole basis of the court's decision. Given the trial court's familiarity with the conduct of the litigation, it was in the best position to evaluate the value of the professional services rendered on defendant's behalf. The trial court did not abuse its discretion in determining the amount of the attorney fees award.

DISPOSITION

The judgment and postjudgment order awarding attorney fees are affirmed. The postjudgment order awarding costs is reversed and remanded with directions to the trial court to enter a new order granting defendant her statutory costs only. Defendant is awarded her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

KRIEGLER, J.